

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARCUS HUTCHINS,

Defendant.

Case No. 17-CR-124

Milwaukee, Wisconsin

February 22, 2018

TRANSCRIPT OF MOTION TO COMPEL HEARING

BEFORE THE HONORABLE NANCY JOSEPH,
UNITED STATES MAGISTRATE JUDGE

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TRANSCRIPT OF PROCEEDINGS

THE COURT: Good afternoon. Everyone please be seated. Okay. We're here for United States of America vs. Marcus Hutchins, Case Number 17-CR-124. May I have the appearances, please, beginning with the Plaintiff.

MR. CHMELAR: Good afternoon, Your Honor. Michael Chmelar and Ben Proctor on behalf of the United States.

THE COURT: Good afternoon, Mr. Chmelar. Good afternoon to you, Mr. Proctor.

MR. KLEIN: Good afternoon, Your Honor. Brian Klein, Dan Stiller, Marcia Hofmann for Marcus Hutchins, who is here in court, out of custody.

THE COURT: Good afternoon to you Mr. Klein, Mr. Stiller, and Miss Hofmann. And good afternoon to you, Mr. Hutchins.

We are here on Defendant's motion to compel. I have that before me. The Government has responded. Defense has replied. I thought an efficient way to address the motion would be to bring us together and talk about it. Then I can give you a ruling, and then we can discuss moving this case forward. So Mr. Klein, it's your motion. If you can begin first. I think I want to just kind of direct some specific questions, but then you're, of course, free to add anything you think would be helpful. So let's address them one at a time.

The first category of materials you're seeking are

1 materials of communications relating to the surveillance and
2 arrest of Mr. Hutchins. The Government has replied that they
3 have provided several materials in response, including F.B.I.
4 302, two reports of surveillance on 7-26 and August 2nd. Some
5 other materials. But also most recently an August 2nd E-mail
6 regarding the -- discussing the surveillance of Mr. Hutchins.
7 So that's what it appears to be the status of things. Any
8 additional material you received since the motion has been
9 pending, Mr. Klein? And that's one question.

10 And the second question, if you could address it,
11 appears -- I guess from the way I read it also from your
12 response, although you don't intend it to be broad, the request
13 is phrased in a broad way. Although I think I understand you,
14 of course, don't want -- you know, the Agents were talking about
15 what they had for lunch in Vegas. What's the best restaurant to
16 go to. You don't want that kind of stuff. But it is broad as
17 written. Also contemplates a broad order if I were to provide
18 one. So address those two things for me, please.

19 MR. KLEIN: Yes, Your Honor. I do always appreciate
20 restaurant tips, though. But no, we haven't received anything
21 since that production, which was the day they filed their
22 response. So that's the extent of what we received since we
23 filed our reply, Your Honor.

24 THE COURT: And Mr. Klein also, I don't -- I don't
25 want to get in the way of your presentation, but it's just my --

1 there's no jury here. You can sit down. That way the
2 microphone can pick you up.

3 MR. KLEIN: Okay. Yes, Your Honor. So I'll repeat.
4 No, we haven't received anything since that production that the
5 Government produced the day it filed its response. And we
6 are -- again, I think it's important to understand that this
7 request is meant to be contained. You're right. We're not
8 seeking purely logistical, non-substantive communications. You
9 know, where they went to lunch. Or how do I book my plane
10 flight? But we're focussed actually on the exact type of
11 communications we got only after we filed our motion to compel.
12 And that communication, which was sent on August 2nd, is
13 actually extremely relevant to our anticipated motion to
14 suppress. Where the Agents discussed what to start -- what to
15 do if Mr. Hutchins starts drinking.

16 And so we believe there would be additional
17 communications. The Government responds by saying oh, there's
18 no more reports. Well, there's a broad category of potentially
19 responsive documents that would be material to our suppression
20 motion, and those would include other types of E-mails. Text
21 messages that deal with those matters. The Agents were there
22 for quite some time surveilling Mr. Hutchins. And we believe
23 there are likely to be other substantive communications that
24 would be responsive, that would go to our motion.

25 And again, it's not just limited to the issues of

1 intoxication and lack of sleep or exhaustion. But also focussed
2 on the fact that Mr. Hutchins is a citizen of the United
3 Kingdom. How -- the rights people have in the United Kingdom,
4 and how essentially their version of Miranda is very different.
5 And so we were looking for additional communications about those
6 kind of matters. And I think that is a targeted request
7 focussed on our suppression motion.

8 Also focussed, though, to be clear, on what will
9 happen at trial. Because we do expect the Government to
10 introduce statements Mr. Hutchins made in his post-arrest
11 interview. And we expect that to be, frankly, a large portion
12 of their trial. And we have a right to challenge those
13 witnesses. To challenge the substance of what they were told.
14 The circumstances of that in front of the jury. And to probe
15 the facts. And so having the full record of what happened, what
16 the Agents knew, what they were communicating about, what they
17 were communicating about with the prosecutors, potentially, is
18 very relevant to both pretrial motion but also to the trial.

19 THE COURT: Thank you, Mr. Klein. The latter part of
20 your argument regarding Mr. Hutchins' nationality got less
21 attention in the pleadings. And what are you looking for?
22 Discussion, for example -- well, he doesn't know U.S. Miranda
23 rights? That part is a little bit fuzzier than what you're
24 looking for in terms of we're observing him at the airport. His
25 drinking. He appears to be intoxicated. Perhaps we're

1 observing that he's walking in a wobbly way. I don't know. I'm
2 just making these up as examples. But in terms of the
3 nationality question, that's fuzzier in terms of what you are
4 looking for?

5 MR. KLEIN: So there may be discussions about should
6 we provide special advisements to him because he's a foreign
7 citizen? I don't know exactly. You're right, it is a little
8 fuzzier in that sense. But any sort of substantive
9 communication the Agents had prior to the arrest, whether among
10 themselves or with the prosecutors, about how to advise
11 Mr. Hutchins of his Miranda rights. How to deal with the fact
12 that he was a citizen of the United Kingdom. Those would all be
13 relevant. Again, I think in our initial motion we did lay out
14 that theory. The Government sort of glossed over it. And we
15 noted that in our reply. But I think that is actually really
16 important.

17 I would also say it's not just focussed on that one
18 day they chose to arrest him. I think it's of note that
19 Mr. Hutchins went to this conference. DEF CON was there for a
20 long time. It's Las Vegas. They could have chosen to arrest
21 him as soon as he arrived in the country. And we have our
22 reasons we believe they chose to arrest him at the very end of
23 the Vegas trip. And so when you arrest someone at the end of a
24 Vegas trip -- you know, they say what goes on in Vegas stays in
25 Vegas -- but I think there was maybe a pointed reason they chose

1 to wait until the end. And it was, in this case, where
2 Mr. Hutchins, you know, was exhausted, and there were other
3 circumstances that we would think were relevant to that
4 interview.

5 THE COURT: Thank you, Mr. Klein. If I could kind of
6 jump ahead a little bit. I'm trying to think of how all of this
7 information, for example, would play out in a motion to
8 suppress. So -- motion to suppress challenging whether or not
9 Mr. Hutchins knowingly waived his Miranda rights. The spotlight
10 on that kind of analysis for the most part is on -- would be on
11 Mr. Hutchins. His state of mind. What he understood. His
12 physical state. Anything that could have influenced his ability
13 to understand and knowingly waive.

14 Also anything the Officers or Agents may have done
15 that would have overborne his will, if you will. There was no
16 pun intended there. It just came out before I could catch it.
17 So to that -- that being the framework, jumping ahead, I'm
18 trying to see, then, the relevance of some of the materials you
19 may be looking for as to discussions Agents may have had with
20 each other after the fact. Or even before the fact, in terms of
21 the question of overbearing the Defendant's will.

22 MR. KLEIN: Yes, Your Honor. I mean, I think we all
23 know that a Miranda waiver has to be knowing, intelligent, and
24 voluntary. And if you look at the cases we cited -- and it's
25 the Carson case -- it does talk about how if the Agents are

1 aware or have reason to believe that the person is under the
2 influence of drugs or alcohol, then there's a lesser standard
3 when you look at whether they were overwhelmed. Sort of undue
4 coercion. And so I think it is important to know what the
5 Agents' intent was, because I think it backs into what
6 Mr. Hutchins was experiencing.

7 So, for example, if the Agents create a situation that
8 is more likely to lead to a situation where he's not knowingly,
9 voluntarily, and intelligently waiving his rights, that creates
10 a real problem. And also if they're aware that he may not be
11 knowingly doing so because he's a foreigner. Because he's a
12 British citizen. Because they have a very different set of
13 rights they provide. In fact, it's almost like flipped, in a
14 way, if you read what they are. I think that is highly relevant
15 to the inquiry of whether the statements should be suppressed.
16 It's also relevant at the trial, when the Agents are on the
17 stand, so that the jury can judge the credibility of the
18 situation and what surrounded it and take it in the full
19 context.

20 So it is a little nebulous on some level, but I
21 actually think we really pointed it into a very focussed area.
22 Which is, you know, going right to the heart of how -- what
23 happened in this post-arrest interview, and what are the
24 circumstances that led to that. And did the Agents create a
25 situation where it wouldn't be voluntary, knowing, and

1 intelligent?

2 THE COURT: Thank you, Mr. Klein. Let me allow
3 Mr. Chmelar to jump in here, because some of the discussion we
4 are having may be academic if there are no other documents
5 responsive to what you are looking for. So Mr. Chmelar?

6 MR. CHMELAR: Thank you, Your Honor. So we did detail
7 in our response to the motion to compel on Page 3 of our filing
8 what we thought kind of related to what the defense was looking
9 for in the motion to compel. And it details the information
10 disclosed to date. In addition to the things that Your Honor
11 noted were produced shortly after the motion to compel. So the
12 audio recording, the post-arrest statement, the 302 detailing
13 that. But it's recorded. We produced all of that stuff
14 already.

15 The second report that detailed a conversation that
16 was not recorded, that took place between the Agents and
17 Mr. Hutchins on the way to a holding facility. And then
18 Mr. Hutchins was shown certain documents during the post-arrest
19 interview. Those were produced. We even did produce Agent
20 notes that were taken during the interview. The consent forms
21 he signed to have certain digital evidence that he possessed to
22 be searched. His advice of rights form which he signed
23 indicating that, you know, he understood his rights, his Miranda
24 rights, and waiving those.

25 And in addition to that we produced -- certain things

1 I -- I question whether or not they're subject to production,
2 but we did produce them. The E-mail that Mr. Klein was
3 referencing about --

4 THE COURT: August 2nd?

5 MR. CHMELAR: Yeah. Mr. Klein was referencing about
6 how they plan to address making the arrest. I don't know that
7 that's subject to production, because it does go to what the
8 Agents' planning in the case was. And I don't know how -- as
9 Your Honor indicated, it's certainly -- to support a motion to
10 suppress it has to do with what Mr. Hutchins' state of mind was.
11 Whether -- he can certainly take the stand and say he was
12 intoxicated or not. Whether the Agents believed he was
13 intoxicated or not. I don't know how that plays a part in it.
14 But we did produce that.

15 And in response to the suggestion by the defense that
16 there was a constant surveillance on Mr. Hutchins while he was
17 in Las Vegas, and that it was a deliberate process to wait until
18 the end to arrest him, to catch him in an exhaustive state? I
19 think that's just mostly speculation on the defense. As we
20 wrote in our response, it's seeking information that doesn't
21 exist really for -- in support of a motion that might not be
22 there.

23 Our understanding, the Government's understanding, is
24 that there was surveillance conducted on two days. I know the
25 reply the defense filed stated that there was active

1 surveillance watching Mr. Hutchins go everywhere over the course
2 of the entire time he was there. I think they noted something
3 like from January -- July 26th through the 17th -- continuing
4 through August 2nd. And that's referenced on Page 3 of their
5 filing. Their reply.

6 That's not our understanding. Our understanding is
7 that it happened on two days. When he arrived in Las Vegas and
8 they watched him -- F.B.I. watched him check into his hotel he
9 was staying at. And then on the day he went back to the
10 airport, and the day he was leaving. And none of that suggests
11 that there's any kind of, you know, deliberative process by the
12 F.B.I. that was in place to catch him at an inopportune time.
13 When he was staggering, or -- you mentioned, you know, maybe
14 they observed him stumbling around or something like that. None
15 of that is reflected in any of the things that we produced.

16 I mean, these are things -- the reports -- they're not
17 even reports. They're just surveillance logs which, again, I
18 question whether or not they're subject to production. But we
19 did produce them. They are talking about like Mr. Hutchins
20 getting a sandwich at a food cart. And then getting possibly
21 Uber or Lyft and getting to the airport. And then watching him
22 enter the airport. Things like that. These aren't indications
23 that he was under intoxication, or exhausted, or anything like
24 that.

25 So we produced what we've been able to identify

1 regarding surveillance. I don't believe the communications --
2 our position is the communications between the Agents and with
3 the Government attorneys about, you know, our deliberative
4 process about when arrests should be made, things like that are
5 subject to production.

6 And for the sake of this discussion we'll assume that
7 the defense is not looking for, as you mentioned, Judge, like
8 things about like what restaurants to go to. We wouldn't turn
9 over kind of logistical type things because it's not material to
10 any of the issues, either, that we perceive to be maybe an issue
11 at trial, or maybe even pretrial motion.

12 So we've produced everything that we've been able to
13 identify. There certainly may be communications where the
14 Agents do discuss -- you know, as indicated in the E-mail that
15 we produced -- you know, this is what we will do when
16 Mr. Hutchins arrives. And in the event that, you know, a
17 certain event takes place, this is how we should react to it.
18 You know, we've produced that. But I don't think there's any
19 other substantive reports that the defense has asked for
20 production and assume exists. We've not been able to locate
21 those.

22 So I think from the Government's perspective we've
23 satisfied our obligations under the Local Rule 16, Rule 16,
24 Brady, Giglio, 3500. I'm just not -- we're not aware of
25 additional information that at this time is subject to

1 production.

2 THE COURT: Thank you, Mr. Chmelar. So just to make
3 sure that I get it -- so the surveillance reports or logs that
4 you mentioned, were that of July 26th and August 2nd. Is that
5 correct?

6 MR. CHMELAR: Yes.

7 THE COURT: And it's your representation other than
8 those reports there are no other surveillance reports or logs,
9 is that correct?

10 MR. CHMELAR: There's another E-mail we produced.

11 THE COURT: The August 2nd E-mail?

12 MR. CHMELAR: Yeah.

13 THE COURT: I was going to get to that.

14 MR. CHMELAR: So no other -- so they're actually
15 entitled FD-1055 reports. They're physical surveillance logs.
16 We've not located any additional logs like that.

17 THE COURT: And then getting to the E-mail of August
18 2nd, the discussion that you already mentioned. Any other
19 similar E-mails, discussions, or reports?

20 MR. CHMELAR: Similar to the discussion of how to
21 arrest Mr. Hutchins?

22 THE COURT: Yes, how to arrest --

23 MR. CHMELAR: I'm sure there are operational plans
24 about what to do, because it took place -- the arrest took place
25 in an airport. So I'm sure there was additional conversations

1 amongst Agents and law enforcement about how to conduct an
2 arrest in a public sector area like that. But none of them
3 involved any information about how -- you know, what they were
4 observing about Mr. Hutchins. This was purely law enforcement's
5 plan on how to address the arrest and the circumstances in which
6 it was taking place.

7 THE COURT: Any of them discussing how to approach
8 Mr. Hutchins if he's intoxicated? Incapacitated in any way?
9 And any of them discussing the status of Mr. Hutchins as a
10 foreign national?

11 MR. CHMELAR: So I'll address the first one -- first
12 question first. Other than the E-mail, I -- we produced
13 regarding, you know, the possibility if he goes to a -- to a --
14 doesn't even discuss if he's intoxicated. Said if he goes to
15 a -- to an area where alcohol is being served, they wanted to
16 take him into custody at that point. And I should note that
17 prior to the post-arrest interview taking place, Mr. Hutchins --
18 we produced this report as well -- made a statement that he was
19 not under the influence of alcohol.

20 There certainly are discussions amongst law
21 enforcement, both here and overseas, that Mr. Hutchins was a
22 U.K. citizen. So yes, there are discussions about his country
23 of origin, because he was traveling here from a foreign country
24 to the United States. So there was certain preparation put in
25 place in the event that Mr. Hutchins did, in fact, travel to the

1 U.S.

2 THE COURT: Thank you. Anything else, Mr. Klein?

3 MR. KLEIN: Yes, Your Honor. I would just like to
4 respond briefly. I mean, I think the Government's response
5 basically assumes that we're going to lose our motion. But I
6 don't think we should assume that. I mean, we're trying to --

7 THE COURT: I'm not assuming that, Mr. Klein. The
8 motion's not even before me yet. I can't read into the future.

9 MR. KLEIN: I know. So I can't read into the future,
10 but the things Mr. -- the things the Government just described
11 are exactly the kind of things we're asking for. We think are
12 relevant for that motion. Discussions among law enforcement
13 about the plans to arrest him related to his foreign status.
14 They have those things.

15 They also -- Mr. -- I was a former Federal prosecutor.
16 I know when Agents go to arrest people they often communicate by
17 text. It's not just by E-mail, because it's cumbersome.
18 There's been no discussion or -- as far as I know -- review to
19 see if there's been any text messages exchanged among the Agents
20 that would also address these issues. And I think that's highly
21 relevant.

22 And the reason why I say it's relevant, a motion to
23 suppress isn't just about what's in Mr. Hutchins' mind. It's
24 also about whether the Government was creating the situation
25 that would be coercive. And that's directly in the Carson case,

1 Your Honor, and I don't need to read it unless you want me to.
2 But the determination is whether the Police coerced a suspect.
3 Or whether the Government coerced a suspect. And so their plan,
4 how they set this up, whether they -- their concerns about him
5 being a foreign national, their concerns about him at the end of
6 the Vegas trip, whether he'd be able to knowingly,
7 intelligently, voluntarily waive his rights, are all incredibly
8 relevant to what we want to do here.

9 THE COURT: Well, Mr. Klein, on the foreign national
10 part -- again, getting back to the fuzziness. I mean, relevant
11 to your motion it's not just the fact of being a foreign
12 national. They knew that. Or -- relevant to your motion is how
13 does the fact of his foreign national-ness play into his ability
14 to understand his rights? So it's not just if there's a report
15 out there, a discussion about well, he's a foreign national,
16 then you get it. It's are there reports discussing
17 Mr. Hutchins' foreign national-ness, nationality, as it relates
18 to Miranda rights or understanding that procedure? It's very
19 specific. It's not broad.

20 MR. KLEIN: That's right, Your Honor. We are focussed
21 and targeted on that. And again, it's -- again, not just
22 reports, but types of communications. But yes, Your Honor.

23 MR. CHMELAR: I can tell you, Judge, there are no
24 communications regarding the accomodation of his -- fact that
25 he's a United -- a citizen of the United Kingdom, and his

1 ability to understand perspectively Miranda rights. I mean,
2 that's taken at the time the person is being interviewed.

3 The other issue that always comes up when a foreign
4 national is arrested in the U.S. is compliance with the Vienna
5 convention. So a lot of the discussions go about communicating
6 -- you know, making sure that we follow what we need to do to
7 comply with the Vienna convention, which is one of the documents
8 we also produced, just notifying the Embassy. As Your Honor
9 knows, certain countries require mandatory notification. Some
10 are discretionary. I think the United Kingdom is a mandatory
11 situation.

12 So it's -- you know, it's conveying information to the
13 Agents about that fact, since he's a foreign national. We have
14 to make sure that we're complying with our conventions. But to
15 my knowledge I've never seen any documents, nor am I aware of
16 any documents that exist that discuss the fact that Mr. Hutchins
17 is a citizen of the United Kingdom in the context of whether or
18 not he would understand Miranda. I can speculate as to why, but
19 to my knowledge I don't -- I'm not aware of any.

20 THE COURT: Thank you. Mr. Klein, you're raising your
21 hand.

22 MR. KLEIN: I feel like I'm in class. So I don't know
23 what the best way to get your attention is, Your Honor, but just
24 real quick. I appreciate that statement, but I don't know that
25 the Government has conducted or reviewed text messages among the

1 Agents for those kind of things. It seems like they just
2 don't -- that it's even something they're going to look at. And
3 so counsel for the Government may be right but, you know, we
4 would ask Your Honor to have them double-check that at a
5 minimum. And do a thorough check of E-mail, text, and
6 correspondence. Because it's very possible the prosecutors
7 weren't copied on things and they aren't aware of them. That
8 happens all the time.

9 MR. CHMELAR: I have gone to the F.B.I. and reviewed
10 all electronic communications, including text messages, and they
11 don't -- if you're asking if a communication exists that puts
12 some sort of weight on the fact that he's a citizen of the
13 United Kingdom, and his ability to understand or not understand
14 Miranda, it just does not exist in text or E-mail. I'll be
15 happy to review again.

16 THE COURT: Thank you. Okay. So as to the first
17 category, request materials of communications relating to
18 surveillance and the arrest of Mr. Hutchins, I will deny that
19 motion without prejudice. I'm denying it based on the
20 representation of the Government today that that there are no
21 additional documents responsive to this request with the
22 understanding clearly of what Mr. Hutchins (sic) is looking for.
23 Not just all and everything, but specifically relating to
24 Miranda issues, both as to his physical and mental state, and
25 also his foreign nationality. I will, however, order that the

1 Government just double-check, because I have been framing my
2 questions in terms of reports and E-mails. That the Government
3 also double-check also that there are no text messages that are
4 responsive, again, to what we're talking about here. Again,
5 it's not just Mr. Hutchins is a foreign national, but again, it
6 has to be relevant to his ability to understand Miranda and
7 knowingly waive them.

8 So that motion is denied. I say without prejudice,
9 because I know things are dynamic and sometimes even if there's
10 an evidentiary hearing, sometimes there's testimony that opens
11 the door to more information that perhaps the parties are not
12 aware of pre-motion. Someone was about to speak. I don't know
13 if it was you, Mr. Chmelar?

14 MR. CHMELAR: I was just going to say we will
15 certainly check, Your Honor. We'll continue, obviously, to
16 follow our discovery obligations. And in the event anything
17 is -- becomes newly discovered we will, of course, produce that
18 as soon as possible.

19 THE COURT: Thank you. Number two. Defense seeks
20 materials and communications relating to co-Defendant -- a
21 charged co-Defendant in the Indictment here. Mr. Klein, any --
22 I'll start where I started the last one. Any additional
23 information since this motion has been pending?

24 MR. KLEIN: No additional discovery has been produced
25 to us, Your Honor.

1 THE COURT: Okay. Anything you want to add in regards
2 to this motion?

3 MR. KLEIN: No. I would just emphasize really quickly
4 we think we're very much entitled to this discovery. From the
5 Government's response it seems very clear that they are holding
6 back documents that they would produce if they had -- if they
7 did arrest the co-Defendant, and we feel like we're entitled to
8 those now. And that's what we're asking for.

9 THE COURT: Thank you. Mr. Chmelar?

10 MR. CHMELAR: Nothing additional, Judge. I really
11 don't -- as Mr. Klein was saying that, I was trying to think
12 about what -- what that could potentially be. That -- you know,
13 the suggestion that we were holding information back that we
14 currently possess. I really can't think of what that might be.
15 We -- we turned over, as noted on Page 5 of our response,
16 material that was responsive to an MLAT. And I know that we
17 were going to cover that later. And then the undercover chats
18 that took place between the F.B.I. -- the F.B.I. and the
19 co-Defendant. And then, you know, a copy of the malware that
20 was purchased from the co-Defendant. And then some chats that
21 the individual had on a forum.

22 So I would say that, you know, as material becomes --
23 if new material is obtained, you know, we would certainly
24 produce that. I can't remember if this came up -- the defense
25 argument came up with respect to this topic or not, but there

1 was a question in their filing about a forum AlphaBay.

2 THE COURT: Yes.

3 MR. CHMELAR: That the Government had seized it. The
4 Government had shut it down. And I can't remember -- recall if
5 we -- in our motion or response we noted that recently there was
6 a specific period of time an unencrypted copy of that forum for
7 just a specific period of time -- that just became available.
8 That we put in a request for information related to the
9 co-Defendant. And I believe Mr. Hutchins. If anything is
10 produced in response to that request, we would certainly produce
11 it. But until just recently that was not available to the
12 Government.

13 And I say that meaning like when we just started this
14 discovery process, that was not available to the Government. So
15 that's something that came -- that the Government became aware
16 of. And when we did, we put in a request for -- I think we
17 noted that in our response. So we have not yet received that
18 information, but that would potentially relate to their request
19 for additional information about the co-Defendant.

20 THE COURT: As I read the defense pleadings, it seems
21 that a category or primary area they're looking for on this is
22 evidence perhaps that this co-Defendant was acting independently
23 of Mr. Hutchins. Which, of course, would be a defense at trial.
24 Is there any additional information other than what you have
25 already provided that is responsive to that?

1 MR. CHMELAR: Not that I'm aware of. And I say that
2 with a caveat that I think we put in our response, it is
3 certainly possible that the co-Defendant acted independent on
4 certain -- he had other enterprises going on outside the alleged
5 conspiracy with Mr. Hutchins. What that might be, I'm not sure.
6 The information from AlphaBay might show that. But, you know,
7 not that we -- not that we currently possess.

8 So I'm not -- I'm not aware specifically of something
9 that shows that he was selling the Kronos malware independent of
10 Mr. Hutchins, but rather my earlier statement was meant to
11 indicate that he may have been involved in other criminal
12 activity in addition to selling the malware. But at this point
13 I'm not aware of it.

14 THE COURT: So I think the concern -- the
15 Constitutional concern here, as I see it, is -- and it should be
16 a concern for the Government as well, that we have a
17 situation -- for example, Mr. Hutchins proceeds to trial before
18 a co-Defendant is arrested. And after co-Defendant is arrested,
19 then additional discovery is disclosed to co-Defendant, which
20 Mr. Hutchins did not have, and perhaps that could have been
21 evidence that he would have used in his own defense at trial.
22 So that's the scenario that we're -- I see as a potential
23 Constitutional problem that we ought to avoid, and the
24 Government should equally want to avoid that.

25 MR. CHMELAR: We certainly appreciate that. And I

1 started out in our initial response, I'm not aware of
2 information that we're holding back just waiting to give to the
3 co-Defendant alone. I'm just not aware of that. We gave things
4 actually to the Defendant, Mr. Hutchins. Conversations that
5 were exclusively between the co-Defendant and the F.B.I. We
6 would certainly turn that over to the co-Defendant if he was
7 ever detained and brought here. But I'm not aware -- the
8 Government's not aware of additional information that we would
9 produce as to that individual but not to Mr. Hutchins.

10 THE COURT: Do you both have copies of the Indictment
11 before you?

12 MR. KLEIN: Yes, Your Honor.

13 THE COURT: Do you --

14 MR. CHMELAR: I don't, but I'm familiar with it.

15 THE COURT: I hope so, Mr. Chmelar. So I'm looking at
16 Page 3 of 8, which is overt acts in furtherance of the
17 conspiracy. I believe that's the area that summarizes
18 activities between -- you know, without getting into the
19 specific counts as to Mr. Hutchins and the co-Defendant --
20 paragraph -- I mean paragraph 4(b), on or about July 13, 2014,
21 video showing the functionality of the Kronos Banking trojan was
22 posted to a publicly available website. Co-Defendant used the
23 video to demonstrate how Kronos worked. So is this evidence
24 that Mr. Hutchins has in preparation of his defense?

25 MR. CHMELAR: So the -- in the -- one of the chats

1 that we produced -- so everything alleged in the overt acts that
2 we possessed we produced to defense. So that's a reference to
3 an undercover chat that took place between the F.B.I. and the
4 co-Defendant, and when a demo of Kronos was requested, the
5 co-actor directed the individual, the F.B.I., to YouTube and to
6 the URL. And so there's a URL that was provided. And the video
7 may have since been taken down by YouTube. But I'm fairly
8 certain everything alleged in the overt acts section has been
9 produced to the defense.

10 THE COURT: Okay. So that you anticipated my
11 question, so you spare me from reading another paragraph.

12 MR. CHMELAR: Yes.

13 THE COURT: Representing it's all been provided. All
14 right. Mr. Klein, anything additional?

15 MR. KLEIN: Well, Your Honor, it just obviously is a
16 little confusing to us in the sense that they spent 3 pages
17 arguing why we shouldn't get things, but now we're hearing that
18 we received everything. So I just -- again -- I mean, we have
19 your concern also, Your Honor. That we want to make sure that
20 if the co-Defendant is arrested, there's nothing else they're
21 going to give him, the co-Defendant, that Mr. Hutchins isn't
22 receiving.

23 And I guess to just put a fine point on that, for
24 example, Mr. Chmelar brought up the idea oh, the co-Defendant
25 might have been involved in other criminal activity involving

1 malware. And that would actually be very relevant to us to show
2 they operated independently. And that, therefore, there's a
3 defense here. And so we're just -- you know, we're a little
4 confused by that. I mean, they could have just come out and
5 written hey, we produced everything. They could have told us
6 that in the discovery conferences, but they didn't. So we --
7 we I think in good faith believed, at least until today, that
8 they had not given us things that they would give to the
9 Defendant. The co-Defendant.

10 THE COURT: Thank you, Mr. Klein. Mr. Chmelar,
11 anything else?

12 MR. CHMELAR: Part of -- I'm sorry -- part of our
13 response related to the co-Defendant had to do with this request
14 for information leading, you know, to his location so they can
15 go and interview him. So that related a lot to -- that involved
16 a lot of -- involved -- a lot of our response involved that --
17 that particular topic. So --

18 THE COURT: Thank you. All right. So as to this
19 motion, and given the Government's representation today, this
20 motion is also being denied without prejudice for the same
21 reason. Cases are dynamic. If it becomes necessary to review
22 this, we can cross that bridge when we get there. And then that
23 takes us to item number 3 regarding Randy. Mr. Klein?

24 MR. KLEIN: Yes, Your Honor. Sorry. I'm just
25 flipping the page here. One second.

1 THE COURT: Take your time.

2 MR. KLEIN: So again, I think we're requesting basic
3 information about who we'll call Randy, including quite simply
4 just the name of Randy's attorney. Legally the Government is
5 relying on a mis-categorization of Randy as a tipster. They've
6 made -- in their response basically created the situation where
7 they've agreed that Randy is at least allegedly a percipient
8 witness of certain things. And so, therefore, we believe we're
9 entitled to a lot of information about Randy.

10 It's pretty clear they're going to call Randy at
11 trial, or at least he's very much on their list. And to not
12 even give us the name of his Attorney to go to try to even talk
13 to this person? I mean, that just seems -- you know, a position
14 they should not be taking, frankly. And we're surprised by it.
15 But also we think we're entitled to more than that, of course.

16 And we stand by our position that we're entitled to a
17 full disclosure about this person, and who they are, and what
18 discovery, other statements they might have made. We have a
19 very redacted 302, Your Honor. It's incredibly redacted. Like
20 it's basically black ink. We would like an un-redacted 302 of
21 this person's proffer. We would like other discovery about this
22 person, including whether this person's been provided
23 compensation by the Government in connection with their
24 cooperation. So --

25 THE COURT: Thank you. Mr. Chmelar?

1 MR. CHMELAR: This becomes -- the issue of -- we've
2 all adopted calling him Randy. Comes up later regarding search
3 warrants. So I'll come back to that. But we've produced much
4 more than the 302. And it is, in fact, redacted. So --
5 so they -- the individual we've been discussing as Randy was the
6 subject of a separate -- totally separate Government
7 investigation. He -- Randy came in and proffered with the
8 Government. We produced the proffer letter. Redacted. And
9 then he came in and divulged a great amount of information about
10 certain cyber actors, including Mr. Hutchins.

11 The redactions that Mr. Klein is referencing relate to
12 the other cyber actors other than Mr. Hutchins. So the
13 redactions in the 302 we produced regarding that proffer
14 session? The information about Mr. Hutchins was not redacted.
15 The information about all the other individuals -- and there's
16 pages of them -- were redacted. Because it's not relevant to
17 this particular matter. And the redactions still allow the
18 defense to have an idea of the scope of the criminal conduct
19 that this individual was involved in. And it does disclose a
20 lot of other criminal conduct. The proffer report does disclose
21 a lot of the other additional criminal conduct that this
22 individual was involved in outside of his interactions with
23 Mr. Hutchins.

24 We also produced all the -- some evidence that was
25 seized from that individual's residence during the execution of

1 an unrelated search warrant. And we produced chats between the
2 individual that's been identified as Randy, or discussed as
3 Randy, and Mr. Hutchins over a long period of time. And we
4 produced those to the defense.

5 So the idea that his identity and who he is might be
6 relevant I think is -- we obviously believe is meritless at this
7 point. We -- we proffered to the Court in our response that he
8 might not need to be a witness. These chats were shown to
9 Mr. Hutchins at his post-arrest. Assuming, you know, that
10 nothing is suppressed. The -- we showed the chats that were
11 obtained from Randy to Mr. Hutchins during the post-arrest. He
12 identified them. Made certain statements related to those
13 chats. So the underlying information about Randy -- and I
14 should note we also produced undercover chats that were made by
15 the F.B.I. involving the F.B.I. and Randy before Randy was taken
16 into custody that show his criminal conduct. So we've produced
17 a significant amount of the underlying material that discloses
18 Randy's -- go to Randy's credibility and his veracity.

19 But the one thing we have not disclosed at this point
20 is Randy's identity. Because, one, we believe that in this
21 context -- because Randy came forward after his interactions
22 with Mr. Hutchins had ceased, he wasn't acting as a Government
23 actor at that point. So he was coming in as a tipster to the
24 Government about someone else's criminal conduct.

25 We do note that he did have -- on an occasion he

1 received the Kronos malware from Mr. Hutchins, but that was
2 before he was acting as a Government source. And we've produced
3 the malware that was received to the defense as well. And as
4 Mr. Proctor and I noted in our response, that if we determined
5 that this individual would be called as a witness, we would
6 disclose him -- his identity, as the District Court requires, by
7 the pretrial conference -- final pretrial conference hearing in
8 the packaged material. But I think based on what we've produced
9 to date, and that individual's status with the Government, his
10 identity? The need to know his true identity? I don't think
11 the defense has met their burden under the -- under current case
12 law.

13 THE COURT: Thank you. Mr. Klein, is there anything
14 else you wish to add?

15 MR. KLEIN: Yes. I would just note that -- you know,
16 the prosecutor mentioned that they may not need to call Randy
17 because they may be able to get Mr. Hutchins' alleged statements
18 into the evidence and him acknowledging these reported chats.
19 But even then we still may want to call Randy to talk about
20 those chats and what was happening in the context. So the idea
21 that we can't get the name of the attorney for this person to
22 even see if he'll speak to us? To give us context or
23 information? It just seems, you know, completely not in line
24 with how discovery is supposed to work. And it doesn't seem
25 inconsistent with how the Seventh Circuit has viewed the

1 difference between tipsters and transactional witnesses, which
2 Mr. Randy clearly is. So we think we're entitled to at least
3 some information. Additional information.

4 THE COURT: Thank you. Well, Randy is not exactly a
5 tipster. Not exactly a transactional witness. But perhaps
6 closer to a transactional witness, given his -- what the
7 Government anticipates that he will -- he would testify to. At
8 any rate, the Government has provided a lot of substantive
9 information regarding Randy, but not his identity and that of
10 his attorney. Even with that information, Mr. Hutchins has also
11 a right to prepare for trial. Perhaps do his own investigation
12 on Randy. Perhaps seek the testimony of Randy, or not.

13 I know that the trial Judge Stadtmueller has a
14 pretrial order ordering a list of witnesses to be disclosed. In
15 my view, the time between the final pretrial and the trial date
16 would be insufficient to allow -- if Mr. Hutchins chose to -- to
17 investigate Randy or perhaps assume him as a witness.

18 So I'm not ordering immediate disclosure of Randy's
19 identity, but I am ordering disclosure sooner than the time of
20 the pretrial report. I'm going to use what we usually do in
21 this District, which I believe is usually 30 days prior to the
22 trial date to have this information disclosed, as to allow them
23 to do their leg work as to Randy.

24 MR. CHMELAR: Thank you, Judge.

25 THE COURT: Moving on. Number 4 is regarding --

1 MR. PROCTOR: Your Honor, I apologize. But I have a
2 hearing before Judge Jones. I have to leave.

3 THE COURT: Thank you. Judge Jones is more important
4 than me. Go ahead.

5 MR. PROCTOR: Mr. Chmelar is more important than me.
6 Thank you.

7 THE COURT: Number 4, Mr. Klein, is regarding the
8 Grand Jury instructions.

9 MR. KLEIN: Yes, Your Honor. We think we provided a
10 definitely non-speculative basis to get access to the Grand Jury
11 legal instructions. Just to be clear, it's the legal
12 instructions. Not asking for -- I mean, we'd like witness
13 statements, of course. And we expect them at a certain point
14 under the discovery obligations. But this is focussed on the
15 Grand Jury legal instructions.

16 Our view is it's very clear that -- or at least
17 arguably very clear that the Indictment misstates the law. That
18 would indicate to us -- and I think it should indicate to
19 anyone -- that they -- the Grand Jury would have been likely
20 mis-instructed on the law. So that goes directly to a motion to
21 dismiss we contemplate filing. We can contemplate a motion not
22 just to dismiss those two counts because they're erroneous on
23 their face, but also we can move to dismiss based on
24 mis-instruction of the Grand Jury.

25 And one of the Government's responses to this is well,

1 we're not required to instruct them. Well, they did. And even
2 if they're not required, if they mis-instructed them, it's very
3 clear from case law that is a real problem, potentially, for the
4 Government. And so again, we think this is a fair, targeted
5 request, focussed on a very substantive defense motion that we
6 intend to file. And we'd like access to these legal
7 instructions.

8 THE COURT: Mr. Klein, you may have hit on it. My
9 question to you is, for the purpose of a motion to dismiss are
10 we not talking about two separate grounds?

11 MR. KLEIN: Yes, Your Honor, we are.

12 THE COURT: So I guess my question is, are you able to
13 attack the defect on the Indictment without the instructions to
14 the Grand Jury on the law?

15 MR. KLEIN: I think we could file a motion that would
16 facially move to dismiss the Indictment as being erroneous
17 facially, right? But, of course, we see this as -- you
18 mentioned two parts. One is the facial problems with the
19 Indictment in Counts 2 and 6. And they're actually -- just like
20 little nits or typos? We're not talking about that, of course.
21 We're talking about, frankly, the most material part in any type
22 of white collar case, which goes to the mens rea or the mental
23 state -- alleged mental state of a Defendant.

24 And so we think both because of the nature of the
25 error, as well as the error themselves, that we are entitled to

1 the legal instructions.

2 THE COURT: Thank you. Mr. Chmelar.

3 MR. CHMELAR: You know, obviously we disagree with the
4 defense. I think they're under -- under Rule 12 there's a
5 couple different ways that -- couple different challenges that
6 could be brought. One is impropriety in the Grand Jury
7 proceeding, and one is a facial challenge for failure to state
8 the offense. I think this is the latter. This is -- based on
9 their filing, they're alleging that because the word intentional
10 is missing from two of the counts, that it fails to state an
11 offense.

12 And so whether or not the Grand Jury was told what
13 the -- you know, advised -- or instructed on the law is -- as we
14 put in our response, we don't see how it is relevant or
15 material. We don't have to instruct the Grand Jury. My
16 practice is not to instruct the Grand Jury. Now, it doesn't
17 mean that they weren't instructed in this case. I'm not going
18 to make that representation. But based on what they're filing
19 and what they're alleging the problems are? They don't need the
20 Grand Jury instructions, because they haven't shown a compelling
21 necessity and a particularized need in this particular case.

22 THE COURT: Mr. Chmelar, allow me to interrupt you.
23 What would a compelling need look like in this context? I mean,
24 as you know the Grand Jury is secret. They don't have access to
25 it. How does one show that compelling need in the context of

1 what we're talking about?

2 MR. CHMELAR: In the -- you know, I'd have to think of
3 a hypothetical and maybe a certain situation where information
4 unrelated to the case was presented to a Grand Jury, or
5 information was misrepresented to the Grand Jury.

6 THE COURT: But the defense would never have that
7 information, right? Because they don't have the Grand Jury
8 transcript at that stage. Trying to figure out, how does this
9 look like in real life?

10 MR. CHMELAR: I'm not sure, because the case law on it
11 doesn't -- it's not really -- it's hard to satisfy. And it
12 doesn't happen that often. And if you're asking me for a
13 particular hypothetical in the situation where it could -- would
14 qualify? I couldn't present Your Honor with that circumstance.
15 I just know that in this particular situation that is before the
16 Court right now, an allegation as to Count 6, that the count
17 should say intentionally attempted to cause damage? When
18 attempted, as we put in our response, includes -- it means an
19 intentional act? It's not clear to me that that's -- actually
20 fails to state the offense correctly.

21 And on the other count, it's clearly our position it's
22 a scrivener's error. The other two counts which charge the same
23 conduct do correctly indicate -- use the term intentionally.
24 The one count that the defense is complaining about says
25 knowingly. So there's three counts that all charge the same

1 offense. I don't know, Judge, what the hypothetical would be
2 that qualify, but I know that this particular one is not it.

3 THE COURT: Thank you. Mr. Klein, anything further?

4 MR. KLEIN: Your Honor, I just think we've shown a
5 particularized need for these legal instructions, and I think
6 we're entitled to them. Whether it's -- and it would be the
7 whole -- all of them. And we rest on our papers.

8 THE COURT: Thank you. I think this is one that I
9 need to take under advisement. And here's why. Based on the
10 questions I've already asked, I think it's -- I haven't figured
11 out yet on the standard for this compelling need. What it looks
12 like. Because it's a very difficult standard. So I'd like to
13 take a look at that. That's one.

14 And two, as this is presented, the preliminary request
15 to look at the Grand Jury instructions on the law is very much
16 intertwined with the substantive motion that you would bring.
17 So if you are going to file such a motion, I will entertain both
18 at the same time. So I would like to have that -- take that
19 motion under advisement.

20 MR. KLEIN: That makes sense, Your Honor. We would
21 like to file one at the same time, too.

22 THE COURT: And then lastly, then as to number 5, is
23 the request for the MLAT, M-L-A-T documents. My understanding
24 is from the pleadings that the Government has produced documents
25 received from this MLAT, M-L-A-T, document. But the defense is

1 requesting the underlying application, for lack of a better
2 word. Mr. Klein?

3 MR. KLEIN: Yes, Your Honor. And it's not just the
4 MLATs. The search warrant. The Government made reference today
5 to a search warrant we haven't received related to Randy.
6 Obtained the evidence they provided to us in discovery in this
7 case. So we're seeking both more information related to MLAT
8 requests for underlying documents, as well as the search
9 warrant. I think we laid out our position pretty clear. This
10 isn't about the Government's trial plans or something like
11 their -- trying to get inside their legal strategies. These are
12 documents they used to obtain evidence that they intend to use
13 in this case. And we are seeking those documents. And we
14 believe we are entitled to those.

15 And whether or not we have a motion to suppress of the
16 search warrant, we may or may not. We don't know. We haven't
17 seen it. So it's very hard for us to say we don't. And on the
18 MLATs, we haven't seen them. We don't know what motions we may
19 have there, or how those may play out in trial. We're seeking
20 that information.

21 THE COURT: On the MLATs, Mr. Klein, the Government
22 responded by saying you have the documents. What was produced
23 as a result of them. But the applications themselves are not
24 subject to production under Rule 16, because they're internal
25 Government documents, because they were not sworn or signed by a

1 law enforcement Agent, but actually by D.O.J. attorneys. Can
2 you address that?

3 MR. KLEIN: Yes. That's just not accurate in our
4 view, Your Honor. These are not internal documents. So what
5 that rule is meant to cover is some sort of internal memo the
6 Government might issue like an internal policy. Right? Here's
7 the new policy on this. Or here's how you should handle this
8 case. And it's like, you know, an Attorney General sending some
9 memo down the line to people. That's not what we're seeking
10 here. We're seeking a document that the Government produced and
11 created and sent to a foreign Government. It is by no means an
12 internal document. It was sent to a foreign Government. It is
13 the most external you could get, even. Arguably. So I think
14 that argument doesn't hold any water.

15 THE COURT: Thank you. Mr. Chmelar, if you could
16 address both -- I was focussing on the MLAT, but there's a
17 search warrant issue, too, as well. Address both, please.

18 MR. CHMELAR: So the defense hasn't identified
19 anything to support their request. They fail to identify
20 anything that supports the production of the MLAT request. And
21 despite what Mr. Klein is saying here today, in the motion to
22 compel they said that it contains information regarding the
23 Government's theory of the case, which is why they want it.
24 That's not covered by Rule 16 or any of the discovery process.

25 The underlying records that were obtained through the

1 MLAT were produced. The MLAT request itself was not -- as we
2 indicated, it's not subject, we don't believe, to production
3 under 3500, Giglio, Brady, or anything like that, because it's
4 not signed by -- it's certainly not 3500. It's not signed by an
5 Agent that would, you know, potentially be testifying in this
6 case.

7 The document is conveyed to a foreign Government. I
8 think it is -- the Government obviously believes it is not
9 subject to disclosure under 16. It's specifically excluded
10 under 16(a)(2). It's -- it's not -- if it's not an other
11 internal Government document, it's certainly a memoranda issued
12 by the Government to another foreign Government for information.
13 So to the Government it's not clear that it is subject to
14 production. But the defense has not identified any authority
15 that would lead to its production. So from that perspective, we
16 think that the request for the production of the underlying
17 documents sent to the foreign Government should be denied.

18 THE COURT: Mr. Chmelar, you just quoted from
19 16(a)(2). As you mention, and I already indicated, it speaks of
20 internal Government document. And Mr. Klein is arguing this is
21 not internal. It didn't stay within the D.O.J. It went abroad.
22 So why is this an internal document?

23 MR. CHMELAR: Well, I guess if the view is that the
24 qualifier other internal Government documents relates to all
25 three of those category of information? Then Mr. Klein is

1 correct. It was a document that was produced and sent to a
2 foreign Government. So I guess arguably would not be an
3 internal Government document to the U.S. I'm not sure that
4 16(a)(2) is read in that fashion, but I -- we still don't
5 believe it's subject to production.

6 And I don't see -- outside of whether or not it's
7 specifically excluded under 6(a)(2), it's certainly not subject
8 to production under 16(a)(1). So I think our question would be,
9 Your Honor -- and the question for the defense is what authority
10 supports the production of the documents? If it's not Giglio,
11 Brady, 3500, or Rule 16, why is it subject to production? And
12 our point of view -- from -- our point of view is that it's not.

13 THE COURT: Are you aware of any -- I have not come
14 across this document before. Are you aware of any cases
15 discussing this, Mr. Chmelar?

16 MR. CHMELAR: Yeah. So there's -- it's not exactly a
17 bright line on whether or not they're subject to production.
18 Sometimes it involves whether or not the document -- the
19 information was sent to the foreign Government as sort of a
20 joint operation with that foreign Government. In which case
21 it's -- sometimes things happening in a foreign location during
22 a joint operation then cause them to more likely be subject to
23 production or scrutiny.

24 But to answer your question more specifically, no, I
25 don't think there's a real bright line rule on MLAT requests.

1 THE COURT: Thank you. The search warrant now?

2 MR. CHMELAR: The search warrant goes back to Randy.
3 The search warrant took place during a separate investigation.
4 It took place at a residence in the United States. Mr. Hutchins
5 had no privacy interest in any -- he didn't own the property,
6 didn't live at the property, had no association with that
7 property, or that individual, as far as we know, other than
8 online communications. And as I said earlier, it was a wholly
9 separate investigation that did not involve Mr. Hutchins at all.
10 It just happened to turn out that the individual who was the
11 subject of that investigation knew Mr. Hutchins and his
12 connection to the Kronos malware. But other than that, the
13 affidavit doesn't refer to Kronos. Doesn't have any -- refer to
14 Mr. Hutchins or anything involving Mr. Hutchins or this case.

15 So Agents who work for the F.B.I. work on lots of
16 different matters, and they write lots of reports and affidavits
17 related to other cases. Simply because that Agent may testify,
18 have other, you know, investigations and information and made
19 statements in other cases doesn't mean that they're material to
20 this particular case. And they don't all become 3500. Has to
21 be related to the current case at hand. And that was not the
22 situation here. That affidavit goes to a separate
23 investigation. Does not involve Kronos malware.

24 THE COURT: Thank you. Mr. Klein, anything further?

25 MR. KLEIN: Yes, Your Honor. I think it's -- you

1 know, the Government's made it clear they want to introduce
2 evidence they seized as a result of that search warrant in this
3 case at trial. We have a right, I believe, to evaluate that
4 search warrant and potentially move to suppress it.

5 THE COURT: On what grounds would you seek to suppress
6 it if Mr. Hutchins does not have standing as to that search?

7 MR. KLEIN: Well, Your Honor, off the top of my head,
8 I don't know. But I'd like to look at it and -- you know, there
9 are other grounds to move to suppress a search warrant. Not
10 just -- you can -- at least maybe there is standing. I don't
11 know. I don't know where this residence was. I mean, we've
12 heard, you know, representations. But we haven't seen it. And
13 I would like to look at it.

14 Maybe there are no grounds. But, you know, it is
15 evidence they intend to introduce at trial, and we would like to
16 look at the search warrant. We don't see any prejudice to the
17 Government at us looking at this search warrant. I mean, they
18 articulated nothing, other than they just don't want to give it
19 to us. And so I think we're entitled to it.

20 And the other issue, just going back to the MLAT real
21 quick, the qualifier internal clearly covers all three. I mean,
22 it just wouldn't make any sense. Otherwise the Government would
23 have to produce their reports and memoranda. And that's not the
24 case. So if you read that rule as it's written, it's very
25 clear. It's only covering internal documents. MLATs are

1 produced. Applications are produced. In fact, when the
2 Government seeks abroad to extradite people -- and I have an
3 extradition case now -- they actually produce the whole MLAT to
4 the foreign country and the whole underlying affidavit. And so
5 I think, again, we're entitled to both.

6 THE COURT: Thank you. Mr. Chmelar, as to both --
7 actually both the search warrant and the MLAT. What's the
8 prejudice to the Government?

9 MR. CHMELAR: Well, we don't -- we're certainly not
10 interested in getting into a practice of producing material in
11 unrelated cases because the defense is interested in seeing it.
12 That's not what discovery is for. It's a slippery slope.
13 That -- there's no basis under the law to support the request.
14 Simply because Mr. Klein wants to see an affidavit in an
15 unrelated case doesn't mean that he is entitled to view it. And
16 so for that reason I think it should be denied.

17 I am not familiar with any way or -- to suppress any
18 of the evidence -- for Mr. Hutchins to suppress any of the
19 evidence that was obtained through the search warrant at a
20 location he has no connection to. Likewise, you asked me
21 earlier about the MLAT process and the discovery of that.
22 Mr. Klein mentioned maybe, you know, having that would lead him
23 to the ability to suppress it. I am not familiar with any
24 vehicle in which Mr. Klein would have the ability to suppress
25 anything produced by a foreign Government through a treaty.

1 Because that's what it is. It's production through a legal
2 assistance treaty. I'm not familiar with any mechanisms --
3 maybe Mr. Klein or one of the other defense attorneys are,
4 because it's more in their line of challenging that stuff. But
5 I'm not familiar with it. So the idea that production of either
6 one of them would be supportive of any sort of pretrial motion?
7 I don't think is accurate.

8 THE COURT: Thank you. Okay. So as to the search
9 warrant I have not heard and cannot at this time imagine grounds
10 that Mr. Hutchins would have for challenging the search warrant.
11 I'm denying it on that basis. As to the MLAT, because I have
12 not come across this before, I want to do my due diligence on it
13 and give a written order on that. I think that's all the stuff
14 we had for this afternoon. Mr. Klein, is there anything I am
15 forgetting here on your motion to compel?

16 MR. KLEIN: No, Your Honor. That covers our five.

17 THE COURT: Mr. Chmelar, anything I am forgetting
18 here?

19 MR. CHMELAR: No. I simply have two questions. On
20 the Grand Jury -- instructions to the Grand Jury.

21 THE COURT: Yes.

22 MR. CHMELAR: And the MLAT. Is your -- as to the
23 Grand Jury, does Your Honor want the Government or the defense
24 to look into any case law and provide it to the Court and/or
25 order the transcript related to the potential instructions for

1 the Court to review? Or the same with the MLAT request. I
2 certainly am aware of information that's available to the
3 Government. Case law which I noted earlier may not be --
4 provide a clear, bright line as to either way. But we would
5 certainly be willing to do additional research, if the Court
6 wanted. Because I -- as I sit here thinking about 16(a)(2), I'm
7 pretty sure that it's consistently viewed that -- outside of the
8 open file policy that we have -- that F.B.I. 302's are excluded
9 under that. So I question whether or not that would qualify as
10 an internal document or not. But regardless, if Your Honor
11 would like additional research by the Government, at least, we
12 would be more than willing to provide any.

13 THE COURT: Thank you. As to the MLAT, yes, some
14 research. And I don't want a big brief on it. But additional
15 research that -- because it's not something that comes up a lot.
16 It would be educational for me and help me get it right. Any
17 authority that you have that's relevant both sides can submit to
18 me.

19 And as to the Grand Jury, the way I was going to
20 handle that is to keep the request for the Grand Jury
21 instruction under advisement and to address it along when I'm
22 addressing the anticipated motion from Mr. Klein. That's the
23 way I was thinking about addressing that motion. Mr. Klein, is
24 that the way you understood things on the Grand Jury?

25 MR. KLEIN: It was, Your Honor, but obviously you can

1 choose how to handle it. You're the Judge. So as I understand
2 it, we can file something short. Just sort of a short one or
3 few page thing about MLATs and why we are entitled to it. And
4 then for the Grand Jury --

5 THE COURT: You've already made your argument as to
6 why you are entitled to it. What I'm looking for, if you've
7 seen other -- if you come across other cases on how this is
8 handled, that would be helpful to me.

9 MR. KLEIN: I didn't mean to make an argument. It
10 would just be informative. Here's the cases we can direct you
11 to. And for the Grand Jury, just so I understand, to be clear,
12 when we file our motion to dismiss Counts 2 and 6, our
13 anticipated motion, you will then in viewing that make a
14 decision about whether you think you will want to either look at
15 the legal instructions or provide them to us. Is that what
16 you're saying?

17 THE COURT: That is what I'm saying, because I
18 understand your motion to be on two grounds. Both facial defect
19 and possible mis-instruction of the Grand Jury. And I
20 anticipate -- the Grand Jury part maybe is hard to do without
21 seeing it, but I anticipate in discussing those two grounds to
22 be fleshed out more. And because there's some intertwining
23 between them, it would help me understand whether it's necessary
24 to go there in addressing the motion.

25 MR. KLEIN: So I guess, Your Honor, the crux of our --

1 what I'm trying to understand is if we're filing a motion to
2 dismiss facially, we should file a motion to dismiss based on
3 mis-instruction even though we don't know what they were
4 instructed? Or even if they were instructed? Because the
5 Government wasn't even clear, again, to us, that they even
6 instructed the Grand Jury on the law here.

7 MR. CHMELAR: Yeah, and that's the thing, Judge, for
8 this speculative aspect of this. I mean, every defense Attorney
9 can just file a motion saying they were mis-instructed, with no
10 basis, which is the case here. If the defense hadn't been
11 filing this -- which we put in our motion -- I would just ask
12 to -- I would -- I would make a motion and ask them if I could
13 just amend the count they're complaining about. But if they're
14 going to file a motion to dismiss it, I'll certainly just go
15 back to the Grand Jury and present the case again and cure the
16 defect. Or I can have them file a motion with the Court.
17 Because to me it's just a -- it was clearly a scrivener's error,
18 considering all the way the other counts are charged.

19 So I think that, you know, it's really just -- as it
20 was with the -- you know, the surveillance and the motion to
21 suppress, a search warrant in somebody else's house -- this is
22 just more speculative kind of approach to the case to see what
23 they could do, rather than basing it on what has been produced.

24 So I don't know if that changes Your Honor's position,
25 but that's the way that we see this.

1 THE COURT: My question to you, if you believe that
2 correcting the Indictment would address what the defense is
3 complaining about, why do you need the defense I guess
4 agreement?

5 MR. CHMELAR: Well, because I don't -- I don't see it
6 as a substantive defect. I see it as a scrivener's error. And
7 I can correct a scrivener's error by making a motion to correct
8 it. But if it's deemed to be more substantial error like no,
9 you've got to go back to -- you know, you can't correct it just
10 by motion, then I do have to return to Grand Jury and correct
11 that count with the Grand Jury. That's why I'm saying like
12 if -- but for the fact the defense making a bigger deal out of
13 this than I think it is, I would have just asked them -- I would
14 have brought it to their attention and said, hey, there's this
15 potential error in Count 2. I'm going to make a motion to
16 correct that error. Are you going to object? And work it out
17 that way. But they seem to believe that it serves as grounds to
18 dismiss more than that particular count.

19 THE COURT: Thank you. Mr. Klein, do you wish to jump
20 in here?

21 MR. KLEIN: Just real quick. Obviously we don't view
22 it as a scrivener's error. It's mens rea. Also we don't view
23 our motion as being speculative. In response to at least one of
24 the actually produced materials that are relevant, and we intend
25 to use, so -- before they filed their response. So, you know,

1 we'll handle this how Your Honor -- I think I understand Your
2 Honor's plan. And we'll prepare our motion and we'll raise
3 these issues in our motion, and then I guess Your Honor will
4 decide whether at that time we're entitled to the legal
5 instructions.

6 THE COURT: Thank you, Mr. Klein. That's how we will
7 proceed. I'll see what we have, and we'll sort it out. If it
8 creates doing things in two steps on that particular motion, so
9 be it. We'll cross that bridge when we get there. But for now
10 let's open our calendars, because we do need a schedule in this
11 case. Mr. Klein, allow me to begin with you. Let's get this
12 show on the road here. What do you propose as a deadline for
13 filing motions?

14 MR. KLEIN: Your Honor, I think we were thinking -- so
15 today is --

16 THE COURT: 22nd.

17 MR. KLEIN: I was thinking 45 days. I'm trying to do
18 the math, Your Honor. I'm a lawyer, not a mathematician, and so
19 I can't square where that puts us.

20 THE COURT: Mr. Klein, why don't we keep the math even
21 simpler, to 30. Because I can count to 30. 30 is really clean
22 here and it will allow us to get things going. What do you
23 think about that? So looking at Friday, March 23rd, would that
24 work for you?

25 MR. KLEIN: Can I talk to my co-counsel, Your Honor?

1 THE COURT: Of course.

2 MR. KLEIN: Your Honor, we would ask for just one more
3 week, to the 30th. And part of the reason is Mr. Stiller is out
4 of the country for some of those days right at the filing time.

5 THE COURT: That's fine. March 30th, then, it is. So
6 motions to be filed by defense Friday, March 30th. And then
7 Mr. Chmelar, how much time are you requesting to respond?

8 MR. CHMELAR: Sometime during -- sometime the week of
9 the 16th, potentially, maybe to the 18th, Your Honor.

10 THE COURT: So I'll give you to respond until the
11 18th. And Mr. Klein, what if I give you until the 27th for any
12 replies?

13 MR. KLEIN: Your Honor, I have a conference I'm
14 running on the 27th. Can we ask for just the 30th?

15 THE COURT: Until the 30th? Replies due on the 30th.

16 MR. KLEIN: I hate doing things on Mondays because
17 it's always a possibility of the weekend being ruined. But in
18 this case --

19 THE COURT: So that's the schedule we will follow.
20 And then I want to rewind back to the short submissions that you
21 will provide me to assist me in the MLAT, which is still
22 outstanding. I'd like to do a shorter deadline for that. That
23 way we can address that as well. What's your -- today's --
24 going back again is the 22nd. Again I'm anticipating the
25 letters from you, some citations. What do you -- Mr. Chmelar?

1 MR. CHMELAR: Either the 27th or 29th. I believe I'm
2 out of the office on the 28th and I'm not sure of Mr. Proctor's
3 schedule.

4 THE COURT: So I'll give you until the 29th,
5 Mr. Chmelar.

6 MR. KLEIN: There is no 29th, Your Honor.

7 MR. CHMELAR: Oh, I'm sorry. The 1st.

8 THE COURT: There is no 29th of February.

9 MR. CHMELAR: Sorry, sorry. I'm looking at the wrong
10 month. I'm sorry, Judge. March 1st.

11 THE COURT: March 1st.

12 MR. STILLER: For what it's worth, I'm pretty sure Mr.
13 Proctor is available on February 29th.

14 THE COURT: He probably is. Mr. Klein?

15 MR. KLEIN: That works for us, Your Honor.

16 THE COURT: Okay. So anything you want to submit to
17 me -- again, nothing lengthy. Just what's out there I'd like to
18 know on MLAT due on March 1st. And then I remind the parties if
19 there are any requests for an evidentiary hearing, that you
20 comply with the Local Rule. You just make things smoother.
21 Then I know there's -- if there's agreement with regard to an
22 evidentiary hearing. If there's not, that will allow me to
23 address it right away. We keep that moving. And while I have
24 you all together, I would also like to go ahead and reserve a
25 date for any evidentiary hearing, should one be warranted. That

1 way we know what we are dealing with.

2 MR. KLEIN: How long after the motion -- the reply
3 date do you usually do that, Your Honor? I'm just not sure of
4 your preference.

5 THE COURT: So your motions are due on --

6 MR. KLEIN: The 30th is the last day that -- we intend
7 to reply, so should assume we reply.

8 THE COURT: Any request for evidentiary hearing goes
9 on a different calendar than regular motions. So you would file
10 your motion for -- let's say you file a motion for an
11 evidentiary hearing on March 30th. The Government by practice
12 has 3 days instead of -- to respond to let me know whether
13 there's an agreement to the request for evidentiary hearing. So
14 we could schedule one rather quickly here. Give me a second.
15 Mr. Klein, since you are traveling from out of state I will
16 allow you to propose a date that you can be here in person for
17 any evidentiary hearing, should one be warranted.

18 MR. KLEIN: And, Your Honor, just so you know, Miss
19 Hofmann also is coming from California. And, of course, our
20 client.

21 THE COURT: I mean you collectively.

22 MR. KLEIN: Your Honor, how about the 19th? So it
23 would be the day after the Government files its oppositions.

24 THE COURT: So April 19th.

25 MR. KLEIN: Yes, Your Honor.

1 THE COURT: And do you have a time that works for you?

2 MR. KLEIN: You know, late morning is usually nice,
3 Your Honor. Obviously I don't know what your schedule looks
4 like that day.

5 THE COURT: Mr. Chmelar, April 19th. How does it look
6 for you?

7 MR. CHMELAR: We're talking about an evidentiary
8 hearing?

9 THE COURT: Yeah. We want to reserve a time on the
10 calendar so that you can plan, I also can plan, if we're going
11 to have an evidentiary hearing in this case.

12 MR. CHMELAR: That date is fine with the Government,
13 Your Honor.

14 THE COURT: Okay. So let's schedule it then,
15 Mr. Klein. Let's say early in the afternoon. That would --

16 MR. KLEIN: 1:30, Your Honor.

17 THE COURT: Early in the afternoon. 1:30?

18 MR. CHMELAR: That was April 19th?

19 THE COURT: Yeah, April 19th.

20 MR. CHMELAR: And I may have been confused, but wasn't
21 the defense filing their reply to anything we filed on the 30th?

22 THE COURT: Yes, but that's for evidentiary hearing.

23 MR. CHMELAR: I understand. Okay.

24 MR. KLEIN: So we have it after we file our reply,
25 Your Honor? I mean, that was -- I wasn't sure how this local

1 rule works, and I apologize for my ignorance on this rule. It's
2 a little different than what I've dealt with.

3 THE COURT: It's okay to have it before your reply,
4 because you will have opportunity to do post-evidentiary hearing
5 brief on the motion that necessitates an evidentiary hearing.

6 MR. KLEIN: Okay. I understand, Your Honor.

7 THE COURT: So your reply will be everything that
8 doesn't require an evidentiary hearing.

9 MR. KLEIN: That makes sense to me, Your Honor.

10 THE COURT: Mr. Catlett, can you read back all our
11 dates for us?

12 THE CLERK: For pretrial motions I have the -- the
13 pretrial motions due March 30th. The responses -- the
14 Government response is due April 18th. And the Defendant's
15 reply due April 30th.

16 THE COURT: And then we have our evidentiary hearing
17 on April 19th. And then for the MLAT submission, we have it for
18 --

19 THE CLERK: I have March 1st.

20 THE COURT: March 1st. And we'll also do -- we'll do
21 a written order so that we all are on the same page. Okay.
22 Mr. Klein, anything further from you, sir?

23 MR. KLEIN: No, Your Honor.

24 THE COURT: Okay. Mr. Chmelar?

25 MR. CHMELAR: No. Thank you, Judge.

1 THE COURT: Okay. Thank you all. Safe travels for
2 you who are traveling out of state.

3 MR. KLEIN: Thank you, Your Honor.

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WISCONSIN
3

4 I, HEIDI J. TRAPP, Official Court Reporter for the
5 United States District Court, Eastern District of Wisconsin, do
6 hereby certify that I reported the foregoing Transcript of
7 Proceedings; that the same is true and correct as reflected by
8 my original machine shorthand notes taken at said time and place
9 before the Hon. Nancy Joseph.
10

11 /s/ Heidi J. Trapp
12 Official Court Reporter
13 United States District Court
14

14 Dated at Milwaukee, Wisconsin,
15 this 28th day of February, 2018.
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